(3)

No. 99-606

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.,
BUCK WILLIS,

Petitioners,

v.

JAMES D. GOODPASTER, sued as:
The Honorable James D. Goodpaster;
PUBLIC SERVICE COMPANY OF
OKLAHOMA; JOHN DOE, sued as:
John Doe 1-100,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT AND AUTHORITIES

In its Brief in Opposition Respondent Public Service Company of Oklahoma ("PSO") makes major misrepresentations as to both the facts and law of this case.

I. PSO IS NOT LAWFULLY APPROPRIATING THE USE OF WILLIS' PROPERTY.

The basis of the Court of Appeals decision with respect to both Willis' First Amendment Freedom of Speech claim and Fourteenth Amendment Equal Protection claim was that PSO and its contractor Burlington Northern and Santa Fe Railway Company ("BN") had a lawful right to utilize Willis' property. In fact, as matter of well developed law by both the United States Supreme Court and the Oklahoma Supreme Court, PSO has no lawful right to utilize Willis' property.

For over a century this Court has held that taking property by eminent domain for a non-public use was a violation of the Fourteenth Amendment.

> To be sure, the Court's cases have repeatedly stated the "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."
>
> Hawaii Housing Authority v. Midkiff
> 467 U.S. 229, 241, 104 S.Ct. 2321,
> 2329 (1984):

As public use is a judicial issue, Sears v. City of Akron, 246 U.S. 242, 251, 38 S. Ct. 245, 248, (1918), if the right to a judicial review of the public use of a taking "is to

serve its full purpose then it is clear it must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994 (1972).

In Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975 (1990) this Court held:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. Zinermon, 494 U.S. at 132, 110 S. Ct. at 987.

This Court has always been quite specific when property is physically taken through court proceedings:

> **"The right of a citizen to defend his property against attack in a court is corollary to the plaintiffs' right to sue there."** Degen v. United States, 517 U.S. 820, 826, 116 S. Ct. 1777, 1783 (1996). (Emphasis added)

In the state eminent domain proceeding, PSO had its attorney, the President Pro Tempore of the Oklahoma State Senate, make an ex-parte telephone call to the State District Judge who then issued an Order that discovery for Willis was irrelevant because Willis had no right to be heard in court to defend its property.

On Page 3 of its Brief, PSO simply lies about what happened in the State District Court. Compare PSO's assertions to ¶5 of the Oklahoma Supreme Court decision at App. E at 30a.

Willis immediately appealed and also sought an immediate writ from the Oklahoma Supreme Court to prevent PSO from seizing Willis' property. The writ application was denied and Willis subsequently filed a §1983 Civil Rights Claim in the U. S. District Court which challenged the constitutionality of the seizure of Willis' property. The Oklahoma judiciary was faced with a quandary. If it continued to acquiesce in PSO'S possession of Willis' property without a predeprivation hearing, it ran the risk that a Federal court would declare Oklahoma's entire eminent domain scheme -- a contradictory hodge podge of Constitution Articles, statutes and Supreme Court decisions -- unconstitutional.

On June 24, 1997, the Oklahoma Supreme Court issued its decision in PSO v. Willis, 941 P.2d 995 (Okl. 1997). This was over three (3) years after Willis appealed, but only three weeks after Willis filed a Notice of Appeal to the U. S. Court of Appeals in the related Federal litigation.

The decision was sweeping and unequivocal and specifically addressed PSO's possession of the property in the opening paragraph:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. (App. E. at 29a)

Contrary to PSO's claim, in subsequent proceedings the Oklahoma Appellate Courts agreed with Willis' claim that PSO's possession of the property was without legal basis. In the only subsequent appellate decision the Oklahoma Court of Civil Appeals stated:

> In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this Court's 1995 Opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for a hearing before PSO could condemn and occupy the property. (App. F. at 40a)

Contrary to PSO's claim a landowner in Oklahoma is not required to seek an injunction to preserve his right to a predeprivation hearing. In fact, the Oklahoma Supreme Court specifically rejected the concept of requiring the landowner to seek injunctive relief. Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925, 930 (Ok. 1935).

Interestingly, in PSO V. Willis, supra, the Oklahoma Supreme Court found PSO's possession of Willis' property unconstitutional but made no reference anywhere in the opinion to any requirement for an injunction.

Finally, Willis has not "stood idly by and taken no action" until "well after the railroad was completed."

PSO posted the appraised value of Willis' property with the County Court Clerk in December 1992, and Willis immediately filed a challenge to the public use of the proposed project. As a result of the decision of the Oklahoma Supreme Court in Town of Ames v. Wybrandt, 220 P.2d 693 (Okl.

1950) PSO was precluded from taking possession until the exception was ruled on. Mindful that "the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor" (Town of Ames v. Wybrandt, supra at 695) PSO made no attempt to go on the property even though it had posted the appraised value. Once the exceptions were denied on March 8, 1994, PSO took possession and built its railroad.

Since PSO made no attempt to take possession until after the March 8, 1994, Order overruling Willis' exceptions -- without a meaningful hearing -- Willis had no reason to seek an injunction prior to that time. After that Order, Willis could not seek an injunction because of 66 O.S. §56 which states in part:

> Either party aggrieved may appeal from the decision of the District Court to the Supreme Court; but such review or appeal shall not delay the prosecution of the work on such railroad over the premises in question, if such corporation shall first have paid to the owner of said real property, or deposited with the said clerk for said owner, the amount to assessed by said commissioners or District Court;

As a result, after PSO procured the March 8, 1994 Order, Willis filed an original jurisdiction action with the Oklahoma Supreme Court. PSO's brief at Page 4 described this action as follows:

> During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO

> from constructing the rail spur over Willis' property. Aple. Supp. App. at 118. Willis argued, among other things, that PSO's proposed taking was not for a public use or reasonably necessary. *Id.* After an adversary hearing, the Oklahoma Supreme Court denied Willis' request for an immediate stay. *Id.* at 122. After a further hearing, the Oklahoma Supreme Court denied Willis any equitable relief, with all justices concurring. *Id.* at 123.

PSO's claim that Willis waived its right under both the United States and Oklahoma Constitution to a predeprivation hearing on public use is false and scurrilous.

As a matter of well developed constitutional law under the decisions of both the Oklahoma Supreme Court and this Court, neither PSO nor BN have any right to utilize Willis' property. As a result, the basis of the Court of Appeals' decision collapses and the decision must be reversed.

II. THE OKLAHOMA COURTS HAVE NOT REJECTED WILLIS' POSITION

PSO repeatedly asserts throughout its Brief that the courts have repeatedly rejected Willis' position. These assertions are utterly false. In fact, there are only two Oklahoma appellate decisions and both are consistent and support Willis' position.

As previously noted, the Oklahoma Supreme Court held:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. (App. E. at 29a)

As previously noted, the Oklahoma Court of Civil Appeals held:

> In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this Court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for a hearing before PSO could condemn and occupy the property. (App. F. at 40a)

There are no other Oklahoma appellate decisions regarding this issue. PSO is correct that the Oklahoma Supreme Court has repeatedly rejected applications for a Writ of Mandamus to enforce the Oklahoma Supreme Court's own decision. However, a refusal to accept original jurisdiction is not an adjudication as to the merits of the petitioner's claim. The only decision of the Oklahoma Supreme Court as to the legality of PSO's possession of Willis property is PSO v. Willis, supra at App. E., Pg. 27a.

The failure of the Oklahoma Supreme Court to enforce its decision, instead of defeating Willis' §1983 claim, goes to the crux of the case. Willis is being denied the equal protection of the law by PSO and the Oklahoma Supreme

Court by ignoring his rights which the Oklahoma Appellate Courts readily admit are being violated but which they refuse to do anything about.

Willis is confronted with the very situation described by Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 15, 64 S. Ct. 397, 405 (1944):

> And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?

III. THE COURT OF APPEALS HAS REFUSED TO FOLLOW STATE LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT.

PSO falsely asserts that Willis' contention is that the Court of Appeals "misapplied" state law. Willis' contention is that the Court of Appeals has refused to follow law clearly stated by the Oklahoma Supreme Court. Rule 10a of the Court's rules plainly states that a reason for granting certiorari is that a United States Court of Appeals has decided an important federal questions in a way that conflicts with a decision by a state court of last resort. Rule 10c cites as grounds for certiorari that a United States Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this court. Both of these rules are applicable here.

The assertion by the Court of Appeals that PSO and BN have a right to utilize Willis' property reflects a complete refusal to follow the decisions of the Oklahoma Supreme Court in PSO v. Willis, supra, Town of Ames v. Wybrandt, supra and Wrightsman v. Southwestern Natural Gas Co., supra concerning Oklahoma eminent domain law.

IV. WILLIS HAS ASSERTED COMPELLING REASONS FOR GRANTING CERTIORARI.

Contrary to PSO's assertions, Willis is not asking this Court to interpret state law. The Oklahoma Supreme Court interpreted Oklahoma eminent domain law and set it out in unmistakable terms. Having clearly established that Willis' constitutional rights are being violated by PSO's possession of Willis' property prior to a meaningful hearing, the Oklahoma Supreme Court assured there was no danger of state law being declared unconstitutional in light of this Court's decisions on the same issue. However, having done that, the Oklahoma Supreme Court has been content to allow the decision to be ignored by both the inferior state courts it is supposed to supervise and by PSO. When citizens are confronted with such a breakdown in the state judicial system, it is of paramount importance that citizens have access to the federal courts to ensure the enforcement of the Fourteenth Amendment right to equal protection of the law.

In 1907, the year Oklahoma became a state, this Court held:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.

Chambers v. Baltimore and Ohio Railroad, 207 U.S. 142, 28 S. Ct. 34, 35 (1907).

It is difficult to find a more compelling reason for this Court to grant certiorari, particularly in Oklahoma.

CONCLUSION

The Court of Appeals' decision in this case directly contradicts the holdings of this Court in numerous cases cited herein and blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court.

The Petition for a Writ of Certiorari should be granted.

/s/_____
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